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EXAMINER

STRIMBU, GREGORY J

ART UNIT	PAPER NUMBER
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3634

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Please find below and/or attached an Office communication concerning this application or proceeding.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/004,803
Filing Date: January 09, 1998
Appellant(s): EPPS ET AL.

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John R. Merklings
For Appellant

MAILED

JUL 14 2004

GROUP 3600

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 12, 2004.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 1-5, 7, 9, 12-16, 18 and 19 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

4,560,912 Jonsson 12-1985

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 2-4, 7, 9, 18 and 19 are rejected under 35 USC 112, first paragraph. This rejection is set forth in a prior Office Action, mailed on October 22, 2002. The 35 USC 112, first paragraph rejection of claims 13-15 is not being maintained for purposes of appeal.

The 35 USC 112, second paragraph rejection of claims 1-5, 7, 9, 12-16, 18 and 19 is not being maintained for purposes of appeal.

Claims 1, 5, 12 and 16 are rejected under 35 U.S.C. 103. This rejection is set forth in a prior Office Action, mailed on October 22, 2002.

(11) Response to Argument

35 USC 112, first paragraph

The specification does not provide explicit or inherent support for the sensor being focused upward at an angle that deviates from a vertical axis by not more than about 10 degrees. It should first be noted that the distinction between chemical cases and mechanical cases has no bearing on whether or not the specification provides proper antecedent basis for the claimed invention. The specification provides antecedent basis for the broad range of upwardly focused sensors and the specific example of the sensors angled approximately 10 degrees from the vertical axis.

"Primary consideration, in determining whether application describes claim limitations

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sufficiently clearly that persons of ordinary skill in art will recognize from disclosure that applicants invented processes including those limitations, is factual and depends on invention's nature and amount of knowledge imparted to those skilled in art by disclosure; broadly articulated rules are particularly inappropriate in this area; mere comparison of ranges is not enough, nor are mechanical rules substitute for analysis of each case on its facts to determine whether application conveys to those skilled in art information that applicants invented claims' subject matter". *In re Wertheim*, 541 F.2d 257, 191 USPQ 90 (CCPA 1976). The appellant argues that because the specification sets forth a broad range and a specific example, the factual situation in this appeal is similar to the factual situation in *In re Wertheim*. The examiner respectfully disagrees. In the *Wertheim* case, the specification clearly defined the range of 25% to 60%. However, in the instant case, the specification does not set forth a well defined range. To the contrary, the specification in the instant case sets forth the vague range of upwardly pointing. Therefore, the factual situation of the instant case more closely resembles that of *In re Lukach*, 442 F.2d 967, 169 USPQ 795 (CCPA 1971). The court in *In re Lukach* held that even though the specification set forth the range of "narrow molecular weight distribution", it did not support the distribution ratio between 2.0 and 3.0. The court made this ruling even though the specification supported the specific distribution ratio of 2.6. See *In re Lukach*, 169 USPQ 795, 797 (CCPA 1971).

Moreover, the specification in the instant case clearly sets forth that the sensors must be angled inwardly, i.e., towards the worker approaching the service window. See lines 7-8 of page 4 of the instant application and figure 4 of the instant application.

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Angling the sensors toward the service window would not achieve the appellant's desired goal of activating the service window by sensing an approaching worker. In fact, angling the sensors toward the service window would destroy the appellant's desired result of reducing false activation of the service window since the sensors could sense movement outside of the building and incorrectly activate the window. Clearly, the appellant did not have possession of angling the sensors outwardly toward the service window. However, the claim language "at an angle that deviates from a vertical axis by not more than about 10 degrees" includes angling the sensors towards the window. In other words, the claim language at issue includes the range between about 80 degrees from horizontal to about 100 degrees from horizontal. Accordingly, support for the claim language at issue cannot be found in the specification.

With respect to claim 19, the language found therein is supported by the specification. However, since claim 19 depends from claim 18 which is rejected under 35 USC 112, first paragraph, claim 19 is also rejected under 35 USC 112, first paragraph.

35 USC 103

The combination of teachings of the admitted prior art in figure 5 and Jonsson anticipates the applicant's claimed invention in claims 1, 5, 12 and 16. The admitted prior art in figure 5 discloses a fast food service window having horizontally focused sensors 60 and 62. In order for a worker to activate the window of the admitted prior art of figure 5, a worker must be at the window to break the beam between the sensors 60

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and 62. Jonsson, on the other hand, discloses upwardly focused sensors 10 that are focused at an angle slightly askew from a vertical axis. It is clearly reasonable for one with ordinary skill in the art to replace the well known sensors 60 and 62 of the admitted prior art in figure 5 with the well known sensors 10 of Jonsson to more rapidly operate the window when a worker approaches. In other words, because the sensors 10 of Jonsson are focused upwardly and outwardly, they would detect an approaching worker significantly before the horizontally placed sensors of the admitted prior art in figure 5. Therefore, one with ordinary skill would be motivated to replace the sensors of the admitted prior art of figure 5 with the sensors of Jonsson to at least operate the window as the worker is approaching the window rather than when the worker is at the window to speed up the process of delivering food through the window. Additionally, it should be pointed out that the term "upward" has no reasonably precise meaning in the art. Therefore, the term could encompass the range between 1 degree from horizontal to 179 degrees from horizontal. Even the appellant, on page 8 of the instant appeal brief, has stated that the term could include an angle away from the vertical down to some angle less than 90 degrees. Since Jonsson discloses the sensors being positioned at an angle of 30 degrees from the vertical, Jonsson clearly discloses sensors focused upward at an angle slightly askew from a vertical axis. Moreover, it should be pointed out that the claims require that the sensors be focused upwardly at an angle slightly askew of a vertical axis. Therefore, the claims specify the position of the beam produced by the sensors rather than the physical position of the sensors themselves. Accordingly, Jonsson clearly discloses sensors focused upwardly at an angle slightly

askew of a vertical axis. See figure 4 of Jonsson wherein beam produced by the sensors 10 extends upwardly from the line extending at 45 degrees. Even if 30 degrees is not considered an angle slightly askew from a vertical axis, clearly the beam produced by the sensors is at an angle slightly askew from a vertical axis.

The appellant's comments concerning appendages of people are not persuasive. The appellant is not claiming the combination of a person and a fast food service window. Because the combination of teachings of the admitted prior art of figure 5 and Jonsson are clearly capable of sensing an extended arm of a person before detecting the torso of said person, the combination of teachings anticipates the claimed invention.

The appellant's comments concerning rejections in Office Actions before the Office Action of March 26, 2003 are moot in view of the new grounds of rejection. Therefore, the appellant's comments concerning, for example, the Office Action of November 21, 2001, have not been addressed in the Examiner's Answer. or the above reasons, it is believed that the rejections should be sustained.

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Respectfully submitted,



Gregory J. Strimbu
Primary Examiner
Art Unit 3634
July 9, 2004

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